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IN THE

Supreme Court of the United States

October Term 1957

Docket No. 634

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE*

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BRIEF OF THE NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE*

Interest of the National Freight Claim Council of the American Trucking Associations, Inc., as *Amicus Curiae*

Consent was obtained from the attorneys for the respective parties to permit the National Freight Claims Council of the American Trucking Associations, Inc., hereinafter called the Council, to file a brief *Amicus* as set forth on page 33 *infra*.

The National Freight Claim Council of the American Trucking Associations, Inc., is a division of the American Trucking Associations, Inc., which is a non-stock, non-profit corporation organized and existing under the laws of the

District of Columbia, with offices located at 1424 Sixteenth Street, N.W., Washington, D. C., and is the national trade association of the trucking industry, representing all types of motor carriers, for hire and private.

Broadly, at the trial level before the District Court, and the subsequent appeal before the Court of Appeals, the issue for determination was the legal liability of a shipper to a motor carrier for damages resulting from the leakage of liquid freight contained within used metal drums fractured by "(metal) fatigue."

Participating in the tariff provisions applicable to the case, and under the governing rules adopted in the National Motor Freight Classification pursuant to Part II of the Interstate Commerce Act of 1935, 49 U. S. C. Sec. 319 (1935), as amended (1942), are five thousand interstate motor common carriers. The conclusion of the District Court, 141 F. Supp. 477 (1956), that there is no liability upon a shipper of used drums for damage to other freight resulting from leakage caused by "metal fatigue" was of serious consequence to all common carriers compelled, because of their legal obligation, to accept such shipments. *Chesapeake & Ohio Ry. Co. v. O'Gara, King & Co.*, 144 Ky. 561, 139 S. W. 803 (1911); *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, U. S. D. C. Oregon (1953).

It is the position of the Council that the legal errors by the District Court have been corrected by the opinion of the Court of Appeals; that the holding by the Court of Appeals of a breach of implied warranty by the shipper under the undisputed facts is a valuable, legally correct decision, amply supported by precedent; and that any attack thereon is largely factual, or based upon misconception of the application of legal principle. The sole interest of the Council as *Amicus Curiae* here, is the preservation of the clarification of law applicable to its rules and tariffs as achieved by the decision of the Court of Appeals.

The Statutes and Regulations Governing the Transaction

It is noted that the statutes and regulations pertaining to the instant controversy have been omitted from the Petitioner's brief. They are herewith respectfully set forth as essential to understanding and resolution of the issues:

The Dangerous Article Certification

The authority for the bill of lading certification is found in 49 Code of Federal Regulations (Sec. 77.819) page 263. Pursuant thereto the rules and regulations have been republished by the motor common carrier industry in Agent C. F. Jackson's MF-ICC No. 16-Motor Carrier Explosives and Dangerous Articles Tariff No. 5, Sec. 819:

> "819 Certification of packages. Except as provided herein below, no motor carrier may accept for transportation or transport any class A or class B explosive, blasting caps or electric blasting caps in any quantity, or any dangerous article requiring label as prescribed by these regulations, unless it be certified to him by shipper's name inserted on the label or by the following certificate over the written or stamped facsimile signature of the shipper or his duly authorized agent in the lower left-hand corner of the manifest, memorandum receipt, bill of lading, shipping order, shipping paper, or other memorandum:
>
> > This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission."

The language prescribed appeared on the printed bill of lading issued in the instant controversy. Its efficacy was argued before the trial court and the Court of Appeals. The District Court judge made rulings thereon. The Court of Appeals decided on other grounds and did not rule on this provision. The "Packing Rule" is clearly separate and must be carefully distinguished.

The "Packing Rule"

Its authority originates from Section 316 (b) of the Interstate Commerce Act, Part II, 49 U. S. C., 49 Stat. 558 (1935) which provides:

> "It shall be the duty of every common carrier of property by motor vehicle * * * to establish classifications and just and reasonable regulations and practices relating thereto and to the manner and method of * * * packing * * * property for transportation, the facilities for transportation and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

In compliance with this statute the National Motor Freight Classification No. 9 was issued and filed with the Interstate Commerce Commission (MF-ICC No. 17) by the American Trucking Associations, Inc. Tariff Bureau (C. F. Jackson, agent) on September 10, 1947, effective October 25, 1947. It was stipulated at the trial that, among others, the shipment was subject to this tariff. As quoted by the Court below, Rule No. 5, of this tariff provides as follows:

> "8(a) Barrels * * * drums * * * must be made of wood * * * metal or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

Question Presented

Should Certiorari be granted where:

(1) the petitioner's arguments are essentially issues of fact which, in substance, have been concurrently decided adversely to him by two courts below;

(2) the Court of Appeals did not err in holding on undisputed facts that the defendant-shipper-bailor was liable to the plaintiff-motor carrier for breach of implied warranty in accordance with the "Packing Rule" where the shipper's second hand drums, containing liquid freight,

failed from a latent defect termed fatigue, and damaged the carrier's equipment and other freight;

(3) the issues are neither novel nor unsettled;

(4) the Court of Appeals' decision is not in conflict with any other decision; and

(5) there is no miscarriage of justice.

Statement of Facts

While the facts have been restated in the opinion of the Court of Appeals, *Eastern Motor Express, Inc.* v. *A. Maschmeijer, Jr., Inc.*, 247 F. 2d 826 (1957), and in the opinion of the District Court, 141 F. Supp. 447 (1956), and presumably by the parties hereto, as well as other interested persons, there is one fact that has been underemphasized, or in some instances altogether omitted, that is of such great significance to this proceeding that it is herewith set forth:

The sole cause for the failure of the used drums, inspected and selected by the shipper, and the resultant damage to other freight concurrently in possession of the motor carrier and to the motor carrier's equipment, was a latent defect termed (metal) "fatigue." This uncontroverted finding was set up in the opinion of Judge Conger by way of many questions and answers. Further reference is made to it by him as follows:

> "Further, since Dr. Brown stated that the cause of the fractures was metal fatigue * * *"

The Court of Appeals accepted the finding of fact as contained in the questions and answers by utilizing the conclusion of "latent unfitness" of the containers. Judge Conger described Dr. B. Floyd Brown as a "metallurgist of undoubted quality". Dr. Brown's conclusions (without quotations) are restated, incorporating some of the questions which were summarily answered:

Fatigue is caused by accumulation of damage to the metal as a result of repeated applications of stress above some limit in the case of steel. The longer a drum is used the more likely it is to rupture or break. The break or fracture in the two drums in question were hairline cracks, the width of which were too small to be measurable in ordinary terms, but essentially constituted a one dimensional fracture. It is impossible to see the weakened condition of the containers because in a used drum it may be hidden by paint or otherwise. The cause of the fracture was fatigue alone.

A shipper of commodities ordinarily shipped in drums, knowing its previous history, usage, weight, etc. is in a better position to determine whether a drum is more likely to fracture because of metal fatigue than a shipper who does not know the previous history, and one who acquires drums from many sources, without knowing its history, is assuming a greater risk. A drum, used, with rerolled chime, or reconditioned, is more likely to fracture than a new drum.

The fractures or breaks in the drums were not caused by any particular application of unusual force at the time the drums broke, but they had been used so often and so hard that they had been subjected to many previous stresses, with the result that these drums just wore out from usage. There were no signs of impact with any outside instrumentality at the point of the break. Visual inspection of the bottom of the drum would not, by itself, be sufficient basis to indicate that it was so weakened that it would leak in transportation.

Summary of Argument

1. Petitioner's basic argument is the factual issue of negligence, or contributory negligence, based upon a failure to secure the cargo or to use skids. The proof is alleged

to be shown by photographs taken two years after the loss. These contentions have been previously rejected by the trial court, as well as the Court of Appeals.

2. The carrier is under a statutory duty to accept freight and could not by ordinary observation know that the drums would fracture from metal fatigue. Therefore, he could not take an exception thereto. The "Dangerous Articles" certification on the bill of lading refers to the express warranty in the complaint. It is not related to the "Packing Rule" which is found in the stipulated tariff. The cause for the damage was a latent defect, one of the excepted causes under the bill of lading, which exculpated the carrier from liability. The shipper is a bailor and in accordance with the plain meaning of the "Packing Rule" (or even if interpretation is given thereto) it was the shipper's duty and implied promise to provide containers which afforded safe handling, reasonable and proper protection of contents, and protection against damage to other goods. The shipper-bailor failed to comply with his implied warranty in accordance with all the terms of the agreement, including the "Packing Rule."

3. Logically and legally subdivided, each issue has had ample judicial consideration. The implication of a "clean receipt" when there are defects in the container, and the subsequent liability of the shipper, has been discussed in the old texts. Implied warranty is also an established theory. The (so called) "dangerous article" cases hold the shipper liable for breach of implied warranty on the theory of failure to comply with authorized carrier regulations. This is analogous to the theory here.

4. Careful scutiny of the cases asserted to be in conflict show that they merely reiterate the same principles as applied to the instant litigation, and favor the carrier's position.

5. The shipper's contentions are inequitable in that his conduct must result in damage to other innocent people. He is not deterred from taking affirmative measures to minimize the conditions producing the loss.

ARGUMENT

I

The petitioner's arguments are essentially issues of fact which, in substance, have been concurrently decided adversely to him by the two Courts below.

Regardless of the joint findings of both Courts previously hearing this matter (*supra*, pp. 5 and 6) that the sole cause of the damage was metal fatigue, the Petitioner in factual opposition thereto urges negligence, or contributory negligence on the part of the plaintiff motor carrier. This contention was briefed and argued both at the trial level and before the Court of Appeals. The negligence asserted is based upon (a) the failure to secure and brace the cargo and (b) an alleged duty to use skids for the other general merchandise which was damaged by the leakage. These same allegations are also the basis for the argument of contributory negligence.

The proof of the alleged negligence is based upon certain photos purporting to show that the drums were "out of shape and banged up." Petitioner's brief before the Court of Appeals admits on page 19:

> "The pictures of the drums which were taken in 1951, *2 years after the loss*, indicate indicate abuse and rough treatment in transit which as Maschmeijer contended was the actual cause for leakage." (Emphasis supplied.)

The photos were in evidence in the District Court. Nevertheless, Judge Conger found (64a):

"That the defendant (shipper) has failed to prove that it was negligent not to brace and block the drums." (Parentheses supplied.)

With the same photographs before it, the Court of Appeals approved of the finding of the District Judge (38 App. to Petition). It proceeded to dispose of the residual contention concerning the alleged necessity for the use of skids and pallets. In presently reasserting the argument and dissatisfaction with the Court of Appeals' ruling concerning the use of skids and pallets, the explanation by counsel at the oral argument before the Court of Appeals is pertinent. His theory in this regard, as explained to the Court, was that if the miscellaneous freight were raised from floor level, that the leakage from the drums would not have affected it unless the liquid from the defective drums reached the height of the skids, or approximately four to six inches. The obviously erroneous inference is that leakage from defective drums is a normal incident of transportation within the contemplation of the parties engaged in shipping and transportation. Moreover, (38 App. to Petition) the Court of Appeals recognized that the damages caused by the pervasive odor of the chemical would not have been avoided by the use of skids and pallets.

The factual issue of negligence, as shown by the photos, appears to be the main argument of the Petitioner in seeking Certiorari. Each of the five points of argument, as well as part of the reasons listed for granting the Writ, depends substantially upon the factual contention of negligence, rough handling and bad condition of the drums as shown by the photos taken two years after the incident complained of. The Petitioner's brief refers to this issue on pages 5, 7, 8, 10, 12, 13, 14, 15, 19, 20, 21, 22, 23, 26 and 30. In addition, these same photographs, already twice passed upon, are being submitted to this Court for their evidentiary value as essential to proving the crux of the Petitioner's case. It is respectfully urged that the back-

bone of the Petition is contrary to the test indicated by *Houston Oil Company of Texas et al.* v. *Goodrich et al.*, 245 U. S. 440 (1918):

> "The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above stated claims to warrant a finding in their favor and the Circuit Court of Appeals reached the same result. 226 Fed. Rep. 434." Also see *Southern Power Company* v. *North Carolina Public Service Company et al.*, 263 U. S. 508 (1924).

The point is conclusively shown by tracing the issue through its previous course in litigation. Before the District Court in a "Memorandum After Trial" the legal issue of the liability of the shipper was virtually admitted, with the exception of the affirmative arguments concerning the condition of the drums as shown by the photos upon delivery to the carrier, an obligation to brace, block and secure the freight, as well as to use skids. Other arguments are here abandoned. Even though Petitioner was successful (on other grounds, *i.e.* a purported interpretation of the "Packing Rule") in the District Court, he cross appealed to the Court of Appeals. The Petitioner's brief argued the probative value of the photos in Point I, commencing on page 9. Further, error was urged in regard to contributory negligence. Again it was asserted that this consisted of a failure to brace, block and secure the load, and the failure to use skids and pallets, as well as other issues not raised here. Once more the photos were disposed of by the Court. The cross appeal was denied. As stated in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1948) page 275:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact

by two courts below in the absence of a very obvious and exceptional showing of error. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275; District of Columbia v. Pace, 320 U. S. 698; Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364; Baker v. Schofield, 243 U. S. 114, 118."

II

The Court of Appeals did not err in holding on undisputed facts that the defendant-shipper-bailor was liable to the plaintiff-motor carrier for breach of implied warranty in accordance with the "Packing Rule" where the shipper's second-hand drums, containing liquid freight, failed from a latent defect termed fatigue, and damaged the carrier's equipment and other freight.

The Court of Appeals' opinion succinctly speaks for itself. It is not anticipated by reason of this argument that improvement of the Circuit Court of Appeals' opinion will be achieved. Necessarily, the following arguments are mostly rebuttal of the erroneous legal application by the Petitioner or others interested.

a. Acceptance of Freight

A common carrier, either under or apart from statutory provisions, is under a duty to accept cargo and to transport it. This duty has been characterized as a "public office or trust". *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp. 475; U. S. D. C. Oregon (1953). There is no dispute that the respondent-carrier accepted the freight and gave a receipt therefor without exception in accordance with its statutory duty.

The carrier's duty was solely to make ordinary observation. The bill of lading thereupon acknowledges receipt:

> "The property described * * * in *apparent* good order, except as noted (contents and condition of

contents of packages unknown)." (Emphasis supplied.) Also see *Modern Tool Corp.* v. *Pa. R. Co.*, 100 F. Supp. 595 U. S. D. C., N. J. (1951).

The obligation of disproving the *prima facie* evidence thus established was rebutted by the proof that the drums were loaded by the shipper (3a), that the defective condition of the drums was externally concealed, and that the fractures were the result of metal fatigue. *Teischman* v. *Penn. R.R. Co.*, 230 F. 2d 787, 791 (C. C. A. 3rd) (1956); *York Co.* v. *Central R.R.*, 70 U. S. 107 (1865); *Nelson et al.* v. *Woodruff et al.*, 66 U. S. 156 (1861). These authorities clearly reject any further inferences (mostly factual) from the clean bill of lading as argued in Petitioner's Point III, page 16 and Point IV, page 20. Clearly, the carrier could not have taken exception or rejected the freight under the circumstances of this case.

b. "Dangerous Article" Certification

The authority and language for the Dangerous Article certification found on the face of the bill of lading has been set forth on page 3, *supra*. Judge Conger decided that there was no reliance on this certification based upon his interpretation of the nature of methyl phenol acetate, *i.e.* that it was not a dangerous commodity. This finding related only to the theory of express warranty in the complaint. It was not in any way related by him to the "Packing Rule" which has been set forth on page 4, *supra*. It is now urged that the trial judge "found as a fact that there was failure of proof of reliance" (p. 4 Petitioner's brief.) The primary purpose of the bill of lading certification is in regard to the criminal provisions of 18 U. S. C. Secs. 831-835 (1948). The certification is the basis for accountability for fraud. The provision is substantially distinguishable from the "Packing Rule" provision, as asserted by Petitioner. In the same manner, the argument raised that the implied warranty depended on the dangerous article certification is not valid. The shipper's liability stems from the entire agreement in effect.

The "Packing Rule", *supra* page 4, which was stipulated by the parties as being applicable (15a), is contained within the classification. It was not contained physically on the bill of lading before the Court. It was, nevertheless, part of the agreement between the parties. The tariff rules and regulations published by the carriers pursuant to the regulations of the Interstate Commerce Commission have the effect of law and cannot be added to, altered, amended or changed by oral agreement. The contract between the shipper and the carrier is made up not only of the bill of lading but of the bill of lading plus the tariffs, schedules, and other governing rules and regulations published by the carriers pursuant to the regulations of the Interstate Commerce Commission. *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453 (1931); *Mobile & O. R. Co.* v. *Jensen*, 162 Miss. 741, 139 So. 840 (1932). As set forth *supra* pages 3, 4, the filing of the classification with the Interstate Commerce Commission was notice to the shipper-petitioner of the rules and regulations concerning the manner of packing. As noted in *Bradley* v. *Lake Shore & M.S. Ry. Co.*, 129 N. Y. S. 1045, 1047 (1911):

> "that (the tariff provision) became the law of the case." (Parentheses supplied.)

Thus, as always, there was here a specific reliance upon the express provisions of the "Packing Rule" between shipper and carrier as part of the agreement between them. *Davis, Agent* v. *Henderson*, 266 U. S. 92 (1924). Such was the conclusion of the Court of Appeals, amply supported.

c. Defenses Under the Bill of Lading

In the instant case, the sole cause for the damage was the latent defect of the drums. This proven cause may be considered with the same result, either improper packing, which would constitute an act or default of the shipper, or inherent vice. Both are defenses by a motor carrier under the bill of lading. Defectiveness and unsuitability of the containers in which the commodity has been shipped has

long been recognized as squaring under the exceptions to the bill of lading. *Nelson* v. *Woodruff*, 66 U. S. 156 (1861); 13 C. J. S. (Sec. 79) 152; 13 C. J. S. (Sec. 78) 150.

The case *of Zerega et al.* v. *Poppe et al.*, 30 Fed. Cas. 932, Case No. 18,213 (1849) concerns itself with casks which were allegedly insufficient to bear the weight of oil in them. While the proof in that case was insufficient to prevail (latent defect was not proven), the principle of exculpation of the carrier from liability for excepted causes is set forth. As stated in *Boh Bros. Construction Co.* v. *Perry Heavy Haulers*, 72 F. Supp. 102, at 104 (1947) U. S. D. C. E. D. La. aff'd 166 F. 2d 719 (C. C. A. 5th) (1948).

> "In the absence of limitation by contract, a carriers common law liability for the safe carriage of goods is that of an insurer, except when the injury or damage to goods arises from certain excepted causes, namely, an Act of God or the public enemy, the inherent nature or vice of the goods themselves, and acts of the shipper. Within the last named exception fall such acts as the improper or faulty packing and preparation for shipment; and it may be stated as a general rule, subject to qualifications hereinafter noted, that, *when the loss or injury occurs by reason of the fact that the goods have been improperly or defectively packed, the carrier is relieved of liability.*" (Emphasis supplied.)

Having proven one of the defenses under the bill of lading, *i.e.*, latent defect, the motor carrier could not remain an insurer as asserted by the petitioner. Liability of a common carrier has been expressed as that of an insurer for loss or damage of goods in transit, with certain well defined exceptions. *United States* v. *Savage Truck Line*, 209 F. 2d 442 (C. C. A. 4th, 1953). It has also correctly been stated conversely that the carrier is *not* an insurer because of the exceptions under the bill of lading. *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595, U. S. D. C., N. J. (1951).

d. Shipper's Agreement as Bailor

It is readily conceded that a motor carrier is not an ordinary bailee. He has rather been classified as *locatio operis mercium vehendarum*—the hired carriage of a thing. The shipper is, of course, a bailor, and the law of bailment is particularly applicable to him. As such, and contrary to the arguments advanced, the defenses under 49 U. S. C. 20(11) are not at all pertinent to a shipper-bailor. The shipper's rights, duties and liabilities must be determined from the terms of the contract between the parties, whether express or implied. *Lebkeucher* v. *Penn. R.R.*, 97 N. J. L. 112 (1922) affirmed 98 N. J. L. 271 (1922). As stated therein:

> "Where there is an express contract the terms thereof control since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose and their express agreement will prevail against general principles of law applicable in the absence of such an agreement. 6 Corp. Jur. 1110, Sec. 42."

As it appears in *Insurance Co. of North America* v. *Elgin, Joliet & Eastern Ry. Co.*, 229 F. 2d 705 (C. C. A. 7th, 1956):

> "As said in 8 C. J. S., Bailments, Sec. 22, p. 255: 'The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement.'"

As previously shown, the agreement between the parties in the instant case incorporated by reference the

"Packing Rule". It is the terms of this tariff provision, rather than the test of "reasonable care" (as suggested by the Petitioner and others interested) that applies.

e. Application of Packing Rule

In regard to this rule the District Judge said:

> "But the regulations do not require a drum that shall never leak merely one affording *reasonable* protection, etc.,"

The Appellate Court corrected this error by reversal. Otherwise, it decided on "undisputed facts", accepting and embracing all the findings of fact by the District Court Judge. The Court of Appeals briefly stated:

> "We disagree with that interpretation."

The Court of Appeals recognized that the plain language of the "Packing Rule" did not require, in itself, any construction or interpretation whatsoever. In other words, on appeal there was no finding of uncertainty of meaning. Having determined that the meaning was clear and unambiguous, there was no need for any attempt at construction. *Penn. R. Co.* v. *Fox & London*, 93 F. 2d 669 (C. C. A. 2d), (1938); *Cohn-Hall-Marx* v. *Vanosdall*, 25 Ohio App. 360 157 N. E. 908 (1927).

Even close examination and legal interpretation does not change the results obtained by the Court of Appeals. The "Packing Rule", restated for convenience, provides:

> "8(a) Barrels • • • drums • • • must be made of wood • • • metal or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

The qualifying word "reasonable" appears solely in that portion of the rule requiring that drums must afford "reasonable and proper protection of contents." The conjunctive meaning of the words "and proper pro-

tection of contents'' must also be considered. Nor was safe handling possible. Likewise, the supplemental requirement following the word ''and''—that the drums must protect ''against damage to other goods'' cannot be ignored. The quoted rule actually requires that the drums must be of strength sufficient to afford a tri-fold function, namely:

1. Safe handling;

2. Reasonable and proper protection of contents;

3. Protection against damage to other goods.

At most, the requirement of ''reasonable protection'' is limited by the rule as applying to the second requisite, ''2'' above, *i.e.*, to the contents of the drum. The first requirement for ''safe handling'' and the third requirement that the drums must protect ''against damage to other goods'' are not qualified. They are absolute requirements and duties of the shipper.

In support of the conclusion that there must be compliance with all three parts of the ''Packing Rule'', the following authority is of assistance:

> ''The entire tariff must be visualized and effect given to every word, clause, and sentence, to the end that as said by the courts, the general and specific provisions in apparent contradiction may subsist together.'' *Swift & Co.* v. *Akron, C. & Y. Ry. Co.*, 220 ICC 778, 780 (1937); *Pillsbury Flour Mills Co.* v. *Gr. No. Ry. Co.*, 25 F. 2d 66 (C. C. A. 8th, 1928).

f. Liability of Shipper-Bailor

Thus, either from the plain meaning of the tariff provision, or from principles of construction, the result is the same. The residual question is the liability of the shipper-bailor to the motor carrier-plaintiff, as found in their agreement containing the ''Packing Rule'' as part of the contract in effect.

In accordance with the entire agreement, the Court of Appeals in considering the law applicable stated:

> "Under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made, at least as against latent unfitness."

In support thereof it cited *Hoisting Engine Sales Co., Inc. v. Hall*, 237 N. Y. 30, 142 N. E. 342 (C. A., N. Y.) (affd. 1923). The proponents for the Petition for Certiorari have criticized the citation, but have overlooked the exposition of the basic law as set forth in the case, as follows:

> " 'All implied warranties, therefore, from their nature may attach to a written, as well as an unwritten contract of sale.' Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, 146, 43 N. E. 422, 424 (C. C. A., N. Y., 1896).
>
> "By analogy there is an implied warranty in the hiring or bailment of certain kinds of property."

The application of the principle of implied warranty is protested by the Petitioner. It is also contended that this doctrine is new or restricted in its application. To the contrary, the *Law of Torts*, Second Edition, Prosser (1955) Sec. 83, page 496, states:

> "There are indications of a definite tendency to extend the strict liability of an implied warranty beyond cases involving the sale of goods. It frequently is said that the bailor of a chattel for hire impliedly warrants its fitness for the bailee's use. In some cases this apparently has meant no more than an obligation to use reasonable care, but *in others the bailor clearly is held liable without negligence. A similar warranty has been found in the case of a shipper delivering goods to a carrier,* and a landlord leasing a furnished apartment for a short term. • • • " (Emphasis supplied.)

The term implied warranty is defined in *Black's Law Dictionary*, Fourth Edition (1951) at page 1759:

> "Implied Warranty. When the law derives it by implication or inference from the nature of the

> transaction or the relative situation or circumstances of the parties. Great Atlantic & Pacific Tea Co. v. Walker, Tex. Civ. App., 104, S. W. 2d 627, 632."

In other words, the implied warranty referred to by the Court of Appeals is the declaration or promise by the shipper that the drums, in accordance with the "Packing Rule", would be in good enough condition for transportation to permit safe handling, reasonable and proper protection of contents, and protection against damage to other goods. In tendering the used drums, containing a liquid chemical, methyl phenol acetate, to the motor carrier for transportation, the shipper impliedly warranted that the drums met with the requirement of the "Packing Rule". The fact that the drums fractured, leaked, and caused damage to other freight, by itself, proves that the wornout drums did not have strength sufficient to afford safe handling, reasonable and proper protection to contents, and most conclusively that they did not protect "against damage to other goods", in accordance with the rule quoted. It is thus that the Court concluded that:

> "The 'Packing Rule' (Rule 5 subsection 8 (a)) makes it plain that a shipper by motor carrier is within that rule. (The implied warranty of the bailor against latent unfitness)". (Parentheses supplied.)

g. Shipper's Affirmative Defenses

The Court of Appeals found the issue of contributory negligence "irrelevant", as not applicable to a breach of implied warranty. Such is shown by *Challis* v. *Hartloff, et. al.*, 136 Kans. 823, 18 P. 2d 199 (1933), in regard to this defense, wherein the Supreme Court of Kansas stated:

> "The doctrine of contributory negligence rests in the law of tort as applied to negligence, and is governed by the principles peculiarly applicable to that branch of jurisprudence. 45 C. J. 941".

The Court of Appeals' statement is dictum pertaining to the factual affirmative defense of contributory negligence. In so stating, the Court was taking into consideration all of its previous conclusions—the holding of the case and its findings of fact. Its full significance is:

> After consideration and acceptance of the facts and evidence adduced before the District Court; and having determined that the "Packing Rule" was part of the agreement between the parties; and it being clear that pursuant thereto the shipper-bailor impliedly promised that he would pack the liquid freight in absolute compliance therewith; and it appearing that there was no negligence by the carrier who exercised due care; but rather a failure by the shipper to perform his promise in that damage was caused solely from metal fatigue, a latent defect of the container—that as a further conclusion:
>
> The shipper had breached his implied duty as bailor-warrantor in accordance with the obligation of his contract.

Under these circumstances, the defense of contributory negligence was not applicable. With this explanation, all arguments against this portion of the opinion must fall.

Nor is the criticism of *Overbury* v. *Platten*, 108 F. 2d 155 (C. C. A. 2d) (1939); *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612 (C. C. A. 2d) (1919) (utilized by the Court of Appeals in support of the conclusion of the preceding paragraph) justified. In the case of *Overbury* v. *Platten* (*supra*) the decision was rendered by Justice Learned Hand. Justice Clark, the now presiding justice for the Circuit Court of Appeals, 2nd Circuit, was then a member of the Court. His familiarity with the principles therein no doubt motivated citing this case, not as dispositive of the entire situation, but merely for the fundamental principle of law therein contained, when it was stated:

> "* * * it is of course true that, with certain exceptions not here important, an obligor (corresponding to the shipper-bailor in the instant case) taxes the risk of whatever will prevent his performance, but that does not include prevention by the obligee (corresponding to the motor carrier-bailee in the instant case) himself." (Parentheses supplied.)

The analogy is simply that a shipper, as bailor, is absolutely liable for any risk which prevents his performance, although the carrier-bailee may have the same responsibility dependent upon the facts of the case. The converse perspective also produces the same result. Similarly, the application of *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612 (C. C. A. 2d, 1919), has been entirely missed, or utterly garbled in argument. Even if, as contended, this case refers to the possibility of a bailee making a covenant to constitute him an insurer, the same possibility is true to the bailor. Such is obviously the application to the shipper-bailor in the instant case when it was stated in *Mulvaney* v. *King Paint Mfg. Co., supra*, that:

> "It is well settled that if the party, by his contract, charge himself with an obligation possible to be performed he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him, Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762."

In short, the shipper-bailor here did not, by the proofs, exculpate himself from liability in accordance with the exceptions quoted in the ordinary law of bailment. Further, the citation confirms that the contract embracing his liability is controlling and must be enforced according to its terms. The terms of the instant agreement have been discussed, and by them "the duty of the defendant, as bailor-warrantor, is absolute", as stated by the Circuit Court of Appeals. He, therefore, was absolutely liable in accordance with the law of bailments.

III

The issues are neither novel nor unsettled.

Many complicated arguments have been asserted in favor of certiorari. The rebuttal (Point II, page 11 *et seq.*) has necessarily been lengthy. While there may not be any one case which combines all of the separate questions raised, each logical subdivision has been before the courts time and time again. The whole is no greater than the sum of its parts.

The issues have been given ample prior consideration. For example, it would appear that this entire legal controversy was anticipated and answered in *Hutchinson, Carriers* (3rd Edition) (1906) Vol. 1 at page 169:

> "Sec. 163. (& 125.) Recitals as to condition of goods, how far conclusive. It has likewise been determined that the usual recital in such instruments that the goods are in good order has reference only to the external appearance, either of the goods themselves or of the packages into which they are put. Hence, it is always competent for the carrier to show, notwithstanding such an admission, that the loss or damage was caused by the spoiling of the goods from natural decay before they could be delivered, *or that they had wasted from defects in the vessels in which they were contained*, or that it arose from the unskillful or improper manner in which they were packed, or that they had deteriorated or were damaged at the time they were delivered to him. He is not presumed to know the quality of the goods, nor can he refuse to carry them, whatever it may be, if they are fit to carry and are the kind he usually carries, nor can he, ordinarily, know the condition of the contents of the packages or vessels brought to him for transportation. It cannot be supposed, therefore, that he intends by such a recital to admit more than that the goods are in an apparently fit condition for shipment. And such is the construction which these

words have received. *If the damage has proceeded from any such 'hidden cause, whether naturally inherent in the commodity itself or arising from the carelessness of the shipper, the loss must be borne by him.'* The carrier is not then in fault, *nor is his acknowledgement that they have been received in good order or condition a warranty or insurance against such an event.* But if it can be shown that the loss might have been avoided by the use of the proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, he will still be liable." (emphasis supplied)

The old, classic case of *Lister* v. *Lancashire & Yorkshire Ry.*, 1 K. B. 878, 72 L. J. K. B. 385 (1903) also applies. In that case the shipper employed the defendant as a common carrier to transport an engine from his yard to a neighborhood station. The engine was on wheels and had shafts attached by which it could be drawn. En route, one of the shafts broke and the engine was upset and damaged. The shaft was rotten at the point where it broke, but this was not known either to the shipper or carrier, and could not have been discovered by any ordinary examination. In other words, it was a latent defect. The arguments accepted by the Trial Court and reversed on appeal are remarkably similar to the petitioner's contentions in the instant controversy. As stated in the reversing opinion:

"The learned County Court judge was of opinion that common carriers were not only liable for negligence, but were insurers; that the fact that there was a concealed defect in the shaft prevented there having been any evidence of negligence on the defendant in drawing the engine the way they did, but that this did not of itself relieve them of liability. It was contended that when the injury results from an inherent defect in the article carried, the carrier is excused, but in the learned judge's opinion that was much too general a proposition and he could not

see any principle upon which the defendants could claim to be excused the consequences of their act. He therefore gave judgment for the plaintiffs (shippers)." (Parentheses supplied.)

In reversing on appeal the Court said:

"• • • • the learned judge has limited the rule as to non-responsibility of the carrier—the accident happening by the inherent vice or inherent defect when it is in the hands of the carrier—to an extent that he ought not have done. That being so, in my opinion, when you once get that the article is being carried in the ordinary way and every precaution has been taken consistently with that mode of carriage and the accident happens, as the learned judge has found, by the breaking down of the article itself, which causes the whole damage, then the carrier is not responsible. I think Mr. Lush (attorney for the plaintiff) who was very fair in the matter, must have contended, in order to succeed, that, even if the shaft had broken and no other damage had happened that the Railway Company would have been responsible for that shaft and would have had to put it back into its previous condition."

Referring to *Williston on Contracts, Revised Edition*, Volume 4, Sec. 1041, page 2907, it is found:

"One who lets property for hire may reasonably be subjected to the same implied warranties as one who sells goods."

Judge Conger, the parties hereto, and all interested persons agree that the doctrine of implied warranty has been applied previously to the obligation of the shipper, at least in regard to dangerous articles. In support of this proposition the Petitioner and others cite *Brass* v. *Maitland*, 119 Eng. L. R. 940 (1856); *Bamfield* v. *Goole*, 2 K. B. 94 (1910); *Grt. No. Ruy.* v. *L. E. P. Trans. & Depos. Ltd.*,

2 K. B. 742 (1922). There appears to be no authority for limitation of the principle of these cases to dangerous articles only.

In *Bradley* v. *Lake Shore & M. S. Ry. Co.*, 129 N. Y. S. 1045, 1047 (Sup. Ct.) (1911), specific reference is made to a failure of compliance with the provision of the classification filed with the Interstate Commerce Commission. On this basis, it was determined that the acids should have been differently packed before being shipped. It is only in obiter dicta that residual reference is made to the common law duty of the shipper concerning the dangreous commodity.

Similarly, in *Gr. No.* v. *L. E. P. Trans. & Depos. Ltd.*, 2 K. B. 742 (1922), the commodity, perhydrol, was also not packed in accordance with the classification. In finding a breach of implied warranty in reference to the tariff provision, it was stated:

> "The duty is at least as large as that which is imposed upon a person who tenders goods for carriage on a general ship which is the foundation of the warranty • • •."

It is also stated:

> "In my opinion, the foundation of those judgments is, that where a person requests another to perform a statutory duty, there is an implied promise to indemnify him if he suffers damage in the performance of it."

Thus, the nature of the product contained is not necessarily the legal test. The underlying rationale of the established (so called) dangerous article cases is applicable to the instant case in that the shipper failed to comply with the terms of the "Packing Rule" as required by the "law of the case." *Bradley* v. *Lake Shore & M. S. Ry. Co.*, 129 N. Y. S. 1045 (1911). Nor is it conceded that methyl

phenol acetate is not corrosive or dangerous by legal interpretation. It would be so argued, if essential.

Other authorities have passed on the issue of a shipper's liability for defective containers. *The Interstate Commerce Commission* in *So. Mo. Millers Club* v. *St. Louis & San Francisco R. R. Co. et al.*, 25 I. C. C. 245, 250 (1913) said:

> "The shipper should so pack and load his commodity as *to insure* against damage by leakage from the package or otherwise, due to the ordinary incident of transportation." (Emphasis supplied.)

Nelson v. *Stephenson*, 12 N. Y. Super. 538, 5 Duer 538 (1856), involved an obviously harmless commodity, i.e., molasses, which had leaked in transit due to defective drums. The court said:

> "The owner of liquids or any articles especially in casks of any description is, in the first instance, chargeable with the duty of supplying proper ones and would presumptively be responsible for a loss arising from their insufficiency or defects."

Based on the foregoing, it is respectfully contended that the issues are neither novel, unsettled, nor important. To the contrary, it would appear that the decision of the Court of Appeals concerns itself with old ordinary questions, and that it was rendered in the accepted and usual course of judicial proceedings.

IV

The Court of Appeals' decision is not in conflict with any other decision.

It is strenuously asserted that *Commodity Credit Corp.* v. *Norton*, 161 F. 2d 167 (C. C. A. 3rd) (1948) is in conflict with other decisions. To the contrary, the case is obviously harmoniously reconciled with any other decision, and is most favorable to the Respondent-Carrier. It surely must be cited in favor of his position.

Firstly, it establishes that a latent defect is in the exact same category as an excepted peril. Thus, immediately, any of the Petitioner's arguments concerning the liability of the motor carrier under the bill of lading, or under 49 U. S. C. 20(11), or of a contention of an irreconcilable position of dual insurers, is dismissed.

Commodity Credit Corp. v. *Norton* (supra) involved a loss of castor oil from recoopered drums. The shipper sued the carrier for the loss. The crux of a reversal stemmed from a charge by the trial court which inferred to the jury that the defendant motor carrier would be liable only in the event it were negligent. It is agreed as a legal proposal that there may be liability upon a motor carrier for causes other than negligence, specifically its contractual obligation, outside of the excepted causes. However, such an admission does not embrace the contentions of the plaintiff-shipper in the *Commodity Credit* case supra, as listed on page 28 of the Petitioner's brief.

The basic difference in the instant matter is that the carrier here sustained the burden of proof by affirmatively showing that the loss occurred because of the latent defect. This element was missing in the *Commodity Credit* case. In other words, as the *Commodity Credit* case says, the exercise of due care, by itself, is not a motor carrier defense.

There must be proof of an excepted cause. Such proof was found in the instant case.

Nor is there any conflict with the instant or other decisions in regard to the burden of proof concerning negligence. The *Commodity Credit* case merely makes the distinction that *negligence may be involved* upon proof of an excepted cause under the bill of lading, including latent defect rather than *negligence being the issue* without proof of such exception. The language of the Court makes the proposition clear as follows:

> "The manner of handling the cargo, therefore, would be entirely irrelevant *except in the event of an affirmative finding by the jury of a latent defect*, or unless the damage or loss is brought within an excepted peril which would give rise to the application of the rule of negligence. Consequently, a finding that there was no 'rough handling' would not require a determination of the cause in favor of the defendant *sans the additional finding of a latent defect.*" (Emphasis supplied.)

To carry the matter further in regard to negligence it is the federal rule that if a carrier shows the loss to have arisen from an excepted cause, it does not have to show freedom from negligence. The burden of proof is still on the plaintiff (shipper). This conclusion is stated in *Farr Co. v. Union Pacific R. R. Co.*, 106 F. 2d, 437 (C. C. A. 10th) (1939):

> "When damage to goods while in the course of transit is shown to have resulted from an excepted cause the carrier is exempt from liability unless the shipper proves that the carrier was guilty of some negligence in not providing for the safety of goods and that the carrier could have done so."

But the factual issues of negligence and contributory negligence were previously decided adversely to the Petitioner (Point I, p. 8 *et seque*, Point II, p. 11, *et seque*, *supra*).

Other cases alleged to be at variance with the instant case, prove, upon examination, to contain chiefly a different set of facts that change the result of the case, but not the basic law involved. In *National Distillers P. Corp.* v. *Companhia Nacional, etc.*, 107 F. Supp. 65 (U. S. D. C., Pa.) (1952), the railroad was sued for loss of wine through leaking pipes. The pipes had been damaged in previous transportation but were recoopered. The most interesting fact in the case is that the claim agent for the railroad testified, on the basis of similar shipments that the containers were inadequate. Thus, the defendant carrier became involved in the dilemma that if the containers were patently inadequate, that exception should have been taken. Furthermore, it appears that even if his testimony might have been of value in resolving the problem, it was neutralized by similar testimony by plaintiff's witnesses, who showed that they had successfully used such containers on other shipments. Again, there was no actual proof of latent defect, as in the instant case.

More important is the case of *W. A. Hover & Co.* v. *Denver & R. G. R.R. Co.*, 17 F. 2d 881 (C. C. A. 8th) (1927). In this case the railroad carrier was the plaintiff suing to recover on the theory of a violation of Interstate Commerce Commission requirements concerning the gauge of the containers involved. The basis for liability was clearly set forth by the Court as follows:

> "Where a statute imposes a duty upon a person for the protection or benefit of others and he neglects to perform that, he is guilty of negligence and is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute is designed to prevent and which were proximately caused by such negligence. (Citations.)"

The Court then proceeded to find that the statute was unauthorized and therefore by the proof submitted, the violation thereof, as alleged, could not be deemed to constitute negligence. The Court continued to consider that if

there had been independent proof or "any evidence" to show causal relationship between the use of the containers of lesser gauge than specified under the statute, it would have permitted a jury question. But the matter was before the Court on motion to dismiss. The conflicting evidence showed that there were other probable causes. Therefore, the whole matter was considered as conjecture and recovery was not allowed.

Again it can be seen that the quality of the evidence was not comparable to the instant case in which the sole cause for the damage was a failure of the drums because of a latent defect. The principles of the whole case indicate that if the proof had been of the quality of the instant case that the carrier would have prevailed.

The statement of the Court in *Hallanan* v. *Eureka Pipe Line Co.*, 261 U. S. 387, 393 (1923), is respectfully quoted:

> "If it be suggested, that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

V

There is no miscarriage of justice.

To be considered as arriving at a just legal decision is the every day meaning of the perspective of both parties stripped of attempted artificial legal involvement. The carrier in essence says:

> "Pack your commodity in such a manner that I may transport your goods safely to guard against accident. I also require that the packing be sufficient to enable me to carry your product as you gave it to me to its destination. Finally, the container must be sturdy enough so that other items I must legally carry, because of the public nature of my business, are not damaged due to failure of your container. If you do so, and there is a loss, except for a few stated reasons, I will offer no other excuse but will accept full responsibility for any and all losses. This is my packing rule."

In contrast, the shipper argues:

> "We have millions of drums that we use over and over again. We recondition them and cannot always know when they will wear out. We want you to continue to carry these repaired drums, but if for any reason whatsoever they happen to fail while in your possession, don't blame us. We do not know just when they will fail, so that failure cannot be considered intentional. When one of these containers gives out while you are transporting it, we want you to assume full responsibility for any damage caused. After all, you are a public servant and generally considered responsible for anything and everything. Bosh to your 'Packing Rule'! Otherwise, it will cost me money for better drums or for private protection against costly damage suits."

The Court of Appeals sensed the injustice of the shipper's contentions. In regard to the protests of the Petitioner that the test of reasonable "reasonable care" as required in ordinary negligence should be applied, *Dean Prosser, in the Law of Torts* (1955) page 318, aptly states:

> "• • • the basis of his liability • • • is the creation of an undue risk of harm to other members of the community."

Perhaps the best solution that shippers of goods in metal containers could achieve is to follow the recommenda-

tions of the distinguished *Dr. B.* Floyd Brown, who testified in this proceeding. He set them forth in *Bulletin No. 9,* entitled "Failures in Steel Shipping Drums—II", Industrial Information Series, Department of Engineering Research, North Carolina State College, Raleigh, North Carolina (1954), on page 17, as follows:

> "Recommendations to Minimize Failures
>
> 1. Increase the thickness of the bottom head of 55 gallon drums to 17 gauge.
>
> 2. Develop standards of drums acceptable for reconditioning which eliminate the severely battered, the severely rusted, or the overaged, and discourage the reconditioning of those drums which fail to meet specifications.
>
> 3. Collect actuarial data to determine the optimum point for retiring overaged drums regardless of their appearance.
>
> 4. Use meticulous care in surface preparation and in painting and in general measures to protect against corrosion."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
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Consent to File Brief *Amicus Curiae*

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Docket No. 472

A. Maschmeijer, Jr., Inc.,

Petitioner,

vs.

Eastern Motor Express, Inc.,

Respondent.

Re: Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The undersigned, being counsel for the respective parties in the above entitled matter, hereby consent to the filing of a brief *Amicus Curiae* to the Supreme Court of the United States, by Louis Silver as attorney for the National Freight Claims Council of the American Trucking Associations, Inc.

Jerome G. Greenspan,
Counsel for Petitioner.

Zelby & Burstein,

By Herbert Burstein,
Counsel for Respondent

Certificate of Service

I hereby certify that I have this day served the foregoing brief amicus curiae upon Petitioner, by delivery of three copies thereof to its counsel, Jerome G. Greenspan, Esq., 169 William Street, New York, N. Y., this 31st day of January, 1958.

LOUIS SILVER.